In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1048

ANTHONY J. CANON,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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Petitioner, Anthony J. Canon, prays that a writ of certiorari issue to review the opinion and criminal judgment of the Massachusetts Surpeme Judicial Court, entered on October 19, 1977, Petition For Rehearing denied on October 28, 1977.

OPINION OF THE COURT BELOW

The opinion of the Massachusetts Supreme Judicial Court appears in the Massachusetts Supreme Judicial Court "advance sheets" for 1977, at page 2134, and is set out in Appendix A hereto, pages 22-63, infra.

JURISDICTION

The opinion of the court below was entered on October 19, 1977, and a Petition For Rehearing was denied on October 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), since petitioner seeks review of a decision of a state supreme court.

QUESTIONS PRESENTED

1. Was it an unprecedented violation of the Confrontation Clause of the Sixth and Fourteenth Amendments for the state to admit into evidence at petitioner's criminal trial the transcript of an unavailable co-defendant's testimony in a prior civil action?

2. Did the Massachusetts Supreme Judicial Court itself unconstitutionally deny petitioner his right to trial by jury when it affirmed his conviction by holding (with two, rare, dissents) that had the jury been charged in accordance with its new and unprecedented interpretation of a

conflict of interest statute the jury would have convicted him (the court recognizing that the actual charge was fundamentally different), so there was no necessity to afford him a new trial?

While not presented herewith as grounds for the issuance of the writ, if it issues, three subsidiary constitutional questions "on the merits" are also subtended by this case:

(a) Was petitioner denied his right to a speedy trial?

(b) Did the trial judge incorrectly instruct the jury on the meaning of proof beyond a reasonable doubt?

(c) When in this case of first impression the court below interpreted the effective section of the state conflict of interest law so as not to require proof of any criminal intent, nor that the public employee act in any way (a promise to do so being held to be sufficient), was such an interpretation constitutional, and if so, was the statute nonetheless void for vagueness?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, Constitution of the United States of America (in relevant part): "In all criminal prosecutions, the accused shall enjoy

the right ... to be confronted with the witnesses against him...."

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...."

The relevant parts of Massachusetts General Laws, Chapter 268A, Sections 1 and 17(a) are set out in Appendix B hereto, pages 64-65, infra.

STATEMENT OF THE CASE

For several years the petitioner was the City Engineer of Marlborough, Massachusetts, when in January, 1968, he invested, together with two friends, one a lawyer and one a real estate broker, in an option to purchase some land in the city, with a view toward resale to a developer for construction of apartments. A special permit from the City Council was necessary for multi-family developments, and the Council had only the month before granted the first such permit in Marlborough, so the time seemed propitious for the investment. The permit on their land was granted in April, and they sold the land to a developer in July, 1968, making a good profit. Petitioner had had absolutely nothing to do with securing the permit or making the sale, either in his public position as City Engineer or as a private engineer. All he did was invest. He did nothing to help or hinder the project officially,

nor could he have done so had he wished to, given the nature of his duties and the considerations involved in the award of such permits. Petitioner was repaid his investment and one-third of the profit so far in July, 1968, the developer bought the land, and gave a mortgage for the remaining part of the purchase price.

In August, 1968, petitioner accepted a similar engineering position in another city and left Marlborough. For about two years he was sent interest checks for his share of the mortgage indebtedness by his co-venturers, and in the latter part of 1970 he learned that the developer had paid off the mortgage note, and he asked the other two investors for his third of the resulting additional profit (three times the initial payment), but they refused to pay him. He brought suit on his contract for his final share of the profit, and secured a judgment in the lowest state court against his two erstwhile friends. They appealled, and a jury trial was had in 1974. One of the grounds of defense alleged by the two defendants was that the contract was against public policy, being in violation of the Massachusetts bribery, extortion, and conflict of interest laws, although no testimony or argument was adduced directly to the latter issue, and reading the trial transcript, one would be unaware that it was an issue at all. In the midst of the trial the judge suddenly directed a verdict for the defendants, and, in an unusual step, referred the matter to the District Attorney for criminal action. (Some of the real estate

broker's testimony smacked of bribery and extortion.)

In April, 1974, petitioner and his two co-investors were indicted--more than six years after his investment--the petitioner being charged in four indictments with bribery and three violations of the conflict of interest laws. Petitioner's case was severed from the similar charges against his co-defendants' and after a year trying to get a speedy trial, he went to trial in April, 1975.

The Commonwealth called as its first witness the real estate broker co-investor and co-defendant, Curley, who had testified at the civil trial, in part, that petitioner had only been let into the investment because he had threatened to block the project otherwise. Curley was permitted to refuse to testify on the ground of self-incrimination. Over the petitioner's objections the Commonwealth then read to the jury large parts of Curley's civil trial testimony. Curley's prior testimony was, in essence, the state's case. At the civil trial he had been called as a witness by the petitioner to establish the existence of the contract and although the mode of examination was in the nature of cross-examination (as is permitted of an opposing party in Massachusetts), Curley was then asked very little about the aspects of his testimony which were now so damning in a criminal context. Petitioner testified at length in his own defense and called other witnesses. The jury found the

petitioner not guilty of bribery and not guilty of two of the three conflict of interest charges. The trial judge, however, over petitioner's objection, had instructed the jury that as to the conflict of interest charge of which he was convicted (G. L. c. 268A, §17a, pages 64-65, infra) all that was needed to prove the crime was that petitioner had accepted money from a private party while a municipal employee in regard to a matter in which the city had an interest. Petitioner having admitted that he got some of the profit due him from his investment, could not help but be found guilty under that instruction, as the trial judge even forthrightly admitted.

Petitioner's appeal to the Massachusetts Supreme Court presented questions of first impression in that court, both as to the elements of the conflict of interest crime charged under the statute and the admissibility in a criminal trial of an unavailable witness' testimony at a prior civil trial. Almost a year and a half after appellate argument the court affirmed petitioner's conviction in an unprecedented opinion, with two members of the court writing lengthy dissents--almost unheard of for that court. (See Appendix A, pages 33-54, infra) The Court agreed with petitioner that the trial judge had erred in instructing the jury that a municipal employee's receipt of money is alone a crime under the statute, but said there was evidence that petitioner had "promised" to render some engineering services for the investment project, and even though he had in fact rendered no services at all, that promise, together with the receipt of money, constituted a

new crime. The court then, unbelievably, ruled a new trial was however unnecessary, because even if the jury had been properly instructed it would have been "warranted" in finding the petitioner guilty on the evidence -not on any "harmless error" theory. (page 27, infra). As one dissenter phrased his objection to such an unprecedented holding (page 40 , infra):

> "...To say that the defendant's conviction should stand because, in any event a jury judging the facts of a case tried on a correct theory of law could have reached a verdict of guilty is improperly to invade the province of the jury....[T]he construction given the statute by the majority and myself cannot be used retroactively to validate a conviction based on an entirely different theory of what constituted the offense."

Petitioner promptly filed a Petition For Rehearing, pointing out (among other things) that the court's unprecedented holding constituted a fundamental denial of due process of law by denying him the right to trial by jury (pages 55-62, infra). The court also held, citing no apposite authority, that the admission of Curley's civil trial testimony was not a violation of the Confrontation Clause (pages 29-32, infra), thereby becoming the only jurisdiction and the only reported authority to ever so hold. On October 28, 1977, the Petition For Rehearing was denied (three days after its date) without comment (page 63, infra), and this petition for a writ of certiorari duly filed.

REASONS FOR GRANTING THE WRIT

The first reason for granting the writ is to prevent the emasculation of the Confrontation Clause of the Sixth and Fourteenth Amendments worked otherwise by this opinion of the Massachusetts Supreme Judicial Court. The opinion is contrary to the Constitution as interpreted by several opinions of this Court. It is the only reported opinion of any court ever to hold that the prior recorded testimony in a civil trial of a witness unavailable[1] at a later criminal trial may be utilized without violating the defendant's right to confrontation.

This petitioner maintains that the admission of Curley's civil trial testimony--the sine qua non of the prosecution's case--was violative of the fundamental protections the Confrontation Clause affords criminal defendants, as delineated by opinions of this Court for almost one hundred years, most particularly over the last decade or so.[2]

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[1] Petitioner does not argue that Curley was not "unavailable", having successfully invoked his right not to incriminate himself, an issue questioned by one of the dissenters below (pages 45-46, infra).

[2] Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Motes v. United States, 178 U.S. 458 (1900); Mattox v. United States, 156 U.S. 237 (1895).

Petitioner cannot point to any of these opinions as being directly in point—or to any such opinion of any court--none involve the use of civil trial testimony at a criminal trial. See cases collected at 5 Wigmore On Evidence (Chadbourne rev. 1974) §§1395-1399. It would seem that generations of prosecutors have recognized that such testimony does not, inately, have sufficient "indicia of reliability", as the Court said in Dutton v. Evans, 400 U.S. 74, 89 (1970), to satisfy the strictures of constitutional confrontation. From the Court's opinions it is apparent that the existence of sufficient prior cross-examination is the constitutional touchstone, rather than the corollary of a witness's physical presence--whether the cross-examination afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." Mancusi v. Stubbs, 408 U.S. 204, 213 (1973). The Court has recognized in a dictum that one kind of prior testimony, even with cross-examination, may not afford such "a satisfactory basis", saying in Barber v. Page, 390 U.S. 719, 725 (1968):

> "...A preliminary hearing [in the same criminal case] is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial."

It would follow that the "function" of cross-examination in any previous civil trial should be viewed as even "more limited", and, constitutionally, not "a satisfactory basis for evaluating the truth of the prior" testimony of a witness unavailable at the subsequent criminal trial.

It may be that such a generic rule is not constitutionally mandated, and the circumstances of each case examined to determine if the civil trial cross-examination sufficiently tested and probed the witness's testimony, so as to make it's admission not a violation of the right to confrontation. The Court has said, in Mancusi v. Stubbs, supra, at 213, that "the adequacy of [the] examination at the first trial must be taken into consideration." Even judged by such an ad hoc standard, Curley's testimony should not have been admitted. Petitioner maintained below, and reiterates here, that only when the civil trial testimony was subjected to actual, effective cross-examination with an equivalent motive and similar considerations can the admission of such prior testimony not violate the Confrontation Clause. Such a position is a clear inference from this Court's opinions, cited in the last footnote. See also, Chambers v. Mississippi, 410 U.S. 284, 295 (1973). As one leading commentator puts it: "...the essential purpose of confrontation ... is satisfied if the opponent has had the benefit of full cross-examination." 5 Wigmore, supra, p. 199. The court below, however, deemed it sufficient if the defendant had an "opportunity" to cross-examine, whether he utilized the "opportunity" effectively, or at all

(pages 30-31, infra). The parameters of this fundamental right of confrontation cannot, however, be established with semantics. Pragmatism is the key, as the Court recognized in Barber v. Page, 390 U.S. 719, 725 (1968). The reality of an effective cross-examination under similar circumstances must be demonstrated. Here such a demonstration is impossible. Curley and his co-defendant in the civil action alleged as one defense that the contract was void as a matter of public policy because it was generally in violation of Chapter 268A of the Massachusetts General Laws, specifying none of the twenty-four sections of that chapter, at least one of which, §23, prescribes non-penal sanctions. That chapter includes the common law strictures against bribery and extortion, besides the modern "conflict of interest" crimes. His testimony, that petitioner forced his way into the investment by threatening to block the project, goes more to classic extortion or bribery than it does the hypertechnical conflict of interest crime defined for the first time, not incidentally, in the case. None of his testimony was apparently relative to the crime for which petitioner was conficted. The point is elaborated further in Mr. Justice Liacos' dissent in the court below (pages 47-50, infra):

> "...[T]he circumstances in which the former testimony was given must be examined to ascertain whether the testimony was given in compliance with the requisites of the confrontation clause...."

> "Opportunity and motive for cross-examination are the most crucial factors in any evaluation of the reliability of former testimony.... More importantly, the considerations which guide the conduct of the cross-examination or the decision to waive cross-examination during the prior trial must be functionally equivalent to the considerations which prevail at the later trial where the former testimony is introduced.... The issue on which the testimony was introduced in the first proceeding as well as the purpose for which the testimony was offered must be substantially similar to the issue and purpose for which the same testimony is offered at the subsequent criminal trial. See McCormick §257. The issue and the purpose for offering the testimony need not be identical in both proceedings, but they must be sufficiently similar to ensure that the defendant had the same motive for cross-examining the witness at the earlier proceeding as he would have had at the later criminal trial, if the witness had appeared to testify...."

> "...Curley was called by the defendant to testify about the real estate venture and the oral agreement which made the defendant a co-investor in the project. Having called the opposing party

while putting in his own case, the defendant was entitled to cross-examine him, G.L. c. 233, §22. However, the issue on which Curley's testimony was introduced was whether an agreement to include the defendant in the real estate venture had been reached by the parties. The defendant's motive for examining Curley was to demonstrate that an agreement had been concluded which made the defendant a participant in the project and entitled him to receive an equal share of the profit realized by the venture. Conversely, the testimony given by Curley in the civil trial was introduced by the Commonwealth at the defendant's criminal trial to prove that the defendant had illegally used his public office to foster private gain. Had Curley testified in person at the defendant's trial on the indictments, the defendant's motive for cross-examining him would certainly have been altered. He would have undoubtedly probed for inaccuracies and inconsistencies in Curley's testimony and he would have had a stranger motive to impeach the witness.

"Equally important in considering whether the defendant's motive for cross-examining the witness was the same in both proceedings is the obvious shift in the underlying liability associated

with the cases. In the civil action the defendant sought a financial recovery on the basis of an alleged breach of contract, but in the criminal prosecution, not only his liberty, but his personal and professional reputation in the community was at stake. The crucial question whether private services were promised or rendered to the private project by the defendant was not in issue at the civil trial...."

As a general consideration, what civil advocate could function if the lower court's view of the Confrontation Clause is let stand? How could he execute his professional responsibility if he had to inject as a consideration into all civil cross-examinations the possible impact of the witness's testimony at every conceivable criminal trial which might some day find that testimony to be relevant? Clearly, such a task is impossible, and yet the abberrational holding below would require that it be assayed or that unknowable risks be unintentionally borne.

The lower court's interpretations of the Confrontation Clause and the opinions of this Court are clearly erroneous, and this case presents a compelling occassion for the Court to continue its recent definitions of the constitutional parameters involved and obviate the patent unjust progeny of the opinion in this case if it is let stand.

The second reason for granting the writ also presents the Court with a unique question of first impression. The Massachusetts Supreme Judicial Court opinion agreed with the petitioner's argument that the trial judge erroneously interpreted G.L. c. 268A, §17(a), when he instructed the jury "that only the receipt of money need be shown to justify the conviction." The court refused to reverse, however, because it said: "we think the jury were warranted in finding"that petitioner had promised to render engineering advice as consideration for the opportunity to invest, so <u>if</u> the jury had been instructed in accordance with the court's new and unique interpretation of the statute, such a "promise", taken in conjunction with his admitted receipt of part of his investment profit, <u>would</u> have resulted in his being found guilty anyway! Both dissenters[3] firmly pointed out that such a holding "is improperly to invade the province of the jury"--that "the construction given the statute...cannot be used retroactively to validate a conviction based on an entirely different theory of what constituted the offense....[T]he conviction should be reversed so

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[3]Since Colonial times it has been the unusual custom of the Massachusetts Supreme Judicial Court to discourage any dissenting opinions. Rarely is one written--<u>very</u> rarely are two dissents recorded. The two strong dissents in this case, addressing <u>both</u> the reasons forwarded here to grant the writ, are at least strong judicial concurrence with petitioner's contention that error was committed below.

that the defendant can have the opportunity to defend this case on a theory consistent with the [newly devised] statutory prohibition." The dissents do not specifically base their objections on constitutional grounds, but petitioner contends that the Massachusetts Supreme Judicial Court itself unconstitutionally denied him his right to trial by jury by constituting itself as a "super jury"(as he argued in his Petition For Rehearing, page 61, <u>infra</u>) and saying that a properly instructed jury <u>would have</u> convicted him.

The holding below thrusts deeply into the heart "of the very essence of a scheme of ordered liberty." <u>Palko</u> v. <u>Connecticut</u>, 302 U.S. 319, 325 (1937). The holding is so aberrational, however, that petitioner's research has not located much in the the way of apposite authority that constitutional error was committed here. The closest case seems to be <u>Bollenback</u> v. <u>United States</u>, 326 U.S. 607 (1946). The defendant was convicted of conspiracy to transport stolen securities in interstate commerce, only after the trial judge erroneously instructed the jury "that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce...." The Second Circuit held the charge was erroneous, but refused to reverse because the jury "<u>could</u>" have convicted the defendant as an accessory after the fact on the evidence adduced. In an opinion written by Mr. Justice Frankfurter, this Court reversed, only Mr. Justice Black dissenting (on a ground not here in issue).

Noting the Second Circuit's basis for not reversing, despite the erroneous charge, the Court went on (at 610; 613-615):

> "... But Bollenback was neither charged nor tried nor convicted as an accessory after the fact. The Government did not invoke that theory in the two lower courts and disavows it here. And rightly so. The receipt of stolen securities after their transportation across State lines was not a federal crime at the time of the transactions in question...."

> "... That Court [of Appeals], as we have seen, properly rejected the propriety of leaving the case to the jury as the trial judge had left it, but sustained the conviction on its own accessory-after-the-fact theory.... A conviction ought not to rest on an equivacal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough

> to disregard the judge's bad law if he in fact misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks."

> "...In view of the Government's insistence that there is abundent evidence to indicate that Bollenback was implicated in the criminal enterprise from the beginning, it may not be remiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

> "...From presuming too often all errors to be 'prejudicial , the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance however, cumbersome that process may be."

That appellate court's usurpation of the jury's function is very much the same as in this case, and while the Court does not specifically characterize the error as one of constitutional dimension, those are the undertones, particularly the reference to "our Bill of Rights." Another dictum, only the year before Bollenback, finds a unanimous Court sounding the same fundamental tone:

> "...We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error [in the jury charge] was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury, and under our system of justice, juries alone have been entrusted with that responsibility." (Emphasis supplied.) Weiler v. United States, 323 U.S. 606, 611 (1945).

A similar thought was set out by the Court a half a century before in Sparf v. United States, 156 U.S. 51, 106 (1895):

> "...In this seperation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

The Massachusetts Supreme Judicial Court in this case patently has "confounded" and "disregarded" "the functions of court and jury", has unconstitutionally deprived the petitioner of his right to trial by jury, and the Court is importuned to issue the writ and firmly erase this danger to "the stability of public justice."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

COMMONWEALTH V. ANTHONY J. CANON

BY THE COURT. The defendant was convicted of violating the conflict of interest law, G. L. c. 268A, §17(a). He contends: (1) There was no evidence that he rendered any services to the invididuals interested in a real estate venture in which he invested, and their interest was not adverse to the interest of the city where he was a city engineer. (2) His constitutional right to a speedy trial was denied. (3) The testimony of a co-indictee as a previous civil trial was erroreously admitted in evidence. (4) The judge erroneously instructed the jury on the meaning of reasonable doubt. We affirm his conviction.

On April 8, 1974, the defendant was indicted for violation of G. L. c. 268A, §§2(b), 3(b), 17(a), and 19. He was convicted under §17(a) but acquitted of the other three charges. He was sentenced to probation for a year, and the probation was terminated on his motion in October, 1975. The case was made subject to G. L. c. 278, §§33A-33H, and we transferred the appeal to this court on our own motion.

The following facts are not in dispute. For several years ending in August, 1968, the defendant was the city engineer of Marlborough. Curley was a real estate broker, and Lynch was an attorney. In January, 1968, the three agreed to contribute $500 each to an investment in an option on land in the city, with a view to obtaining a special permit for apartments. The defendant gave Curley a check for $500, the permit was obtained, the land was bought for $40,000 and resold for $100,000, and the defendant received $5,500 in the summer of 1968, the return of his investment and part of his share of the profit. Later he sued Curley and Lynch for the balance of his share, and they defended on the ground that the agreement was illegal under G. L. c. 268A. At trial of the civil acti on in 1974 the judge directed a verdict for the defendants and referred the case to the district attorney. Further facts will be stated in connection with the claims of error.

1. Directed Verdict. The defendant's motion for a directed verdict was made and denied at the close of the Commonwealth's case, at the end of all the evidence, and again, at the invitation of the judge, after the verdict. The following evidence, viewed in a light most favorable to the Commonwealth, is pertinent. Lynch was attorney for the owner of the land, and told the owner that a local broker, Curley, was interested in buying it. In 1967 the defendant and Lynch discussed pooling their professional talents and money, and in December, 1967, the defendant advised Curley

and Lynch that the land could be connected to Marlborough sewerage, giving them a rough cost figure. Lynch told Curley that he had been to the defendant's office and that the deal would not go through unless the defendant "was aboard." Thereafter Curley went to the defendant's office to examine a plot plan and a typographical survey with respect to the extension of sewer lines. The defendant told Curley the property could be serviced by sewers "if I say it can be," but "unless I'm aboard on this thing, this doesn't go." On January 9, 1968, the defendant met with Curley and Lynch and declared that "there's no way this is going any place without me aboard." He then executed his check and left it on the table, and it was agreed that the defendant would contribute general engineering advice to the project. The agreement was not put in writing because of the defendant's position as city engineer and Lynch's association in law practice with the mayor and city solicitor. The next day, January 10, Curley and the owner of the land executed a purchase and sale agreement for a price of $40,000 with a $1,000 deposit, contingent on the special permit.

The defendant's responsibilities as city engineer included evaluating plans for the installation of utilities including sewer and water service in new housing developments. A plan of the project was seen on a drafting table in his office, and he said he had made a study of the project and had reached certain conclusions about sewer and water service. But his superior

told him he need not become involved, since the project had been assigned to a private consulting firm.

The statute, G. L. c. 268A, §17(a), provides: "No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest." It is beyond question that the evidence warranted findings that the defendant was a "municipal employee," that he received an economic benefit from persons other than the city, that he received it "in relation to" the special permit for the apartment project, that the granting of the permit was a "particular matter," and that he was not acting "as provided by law for the proper discharge of official duties." It is contended, however, that the economic benefit was not "compensation," defined in G. L. c. 268A, §1, as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." It is further contended that the city was not a "party" and did not have "a direct and substantial interest" in the permit.

As to "compensation," the contention is that the defendant received money as a return on his investment rather than "in return for services rendered or to be rendered." But we

think the jury were warranted in finding that the defendant requested and received compensation in the form of an opportunity to participate in the realty investment, and that he received that compensation, at least in part, in return for his promise of general engineering advice "to be rendered" by him. That was enough to make it "compensation," even if no services were ever rendered or if the investment produced no profit. Moreover, there was evidence that some services were actually rendered, and that the investment did produce profit. The value of the investment was contingent on the granting of the special permit, which occurred on April 15, 1968, and the defendant received money on account of the profit the following summer. We think he may properly be said to have "received" compensation after April 8, 1968. Cf. Commonwealth v. Dutney, Mass. App. Ct. - (1976). He was indicted within the six-year limitation period thereafter. G. L. c. 277, §63. We need not pass on the Commonwealth's contention that he was paid for the negative service of not blocking the project.

As to the city's "interest" in the granting of the special permit, we think it is clear that the "interest" need not be financial. Cf. G.L. c. 268A, §4, where there is explicit reference to a "financial interest." It is hard to hypothesize a "particular matter" involving municipal action in which it can be said with assurance that the municipal interest is indirect or insubstantial. Certainly the city's interest in the proper sewerage for a major apartment development was

neither remote nor inconsequential. It is contended, however, that the city's interest was not adverse to that of the developers, since there was testimony that the project was a "good deal" for the city. We need not consider whether there is any requirement that the interest of the city be adverse to that of the person paying the compensation. For any such requirement is fully met when the payor is applying for a municipal decision and the city is cast in the role of objective and impartial arbiter.

The defendant suggests, though he does not argue in any comprehensible way, that the judge's instructions were somehow inadequate. The judge outlined what the statute says, using the statutory language, and the defendant took no exception to the charge. Though the charge may not have been as complete nor as helpful as it might have been, we think it was adequate. As the judge said to counsel, the jury probably had no choice but to come back with a verdict of guilty, since the defendant had admitted the essential elements of the crime.

2. Speedy trial. The pre-indictment delay from 1968 to April, 1974, seems to be attributable to the secrecy of the venture. See United States v. Lovasco, U.S. 97 S. Ct. 2044 (1977). More than two months after the indictments the defendant filed several discovery motions, accompanied by a motion for speedy trial, but his counsel did not appear on the date scheduled for a hearing on those motions. Without objection

the hearing was postponed until October, 1974. At that time the prosecutor expressed willingness to try the case in November, but the defendant's motion to sever his trial from those of Curley and Lynch was allowed and the prosecuter wanted to try one or both of them before the defendant. The defendant made a renewed motion for speedy trial in November, but for reasons not disclosed it was not heard until January, 1975. Trial of Curley and Lynch had been scheduled for January 20, and the defendant's case was scheduled as the first case out on February 3. On January 28, however, the judge vacated that order. A motion filed on April 2 to dismiss for want of a speedy trial was denied on April 8, and trial began April 16, 1975, about a year after the indictments. In the absence of any showing of prejudice, we think no denial of the defendant's constitutional right to a speedy trial is shown by this sequence of events. Barker v. Wingo, 407 U.S. 514, 530-531 (1972). Although the delay was substantial, the defendant was not incarcerated, and there was no problem of loss of witnesses or failure of memory during the period of delay attributable to the prosecutor. That period was a little over six months, and is explained in part by the problems arising from the allowance of the defendant's motion to sever.

3. Recorded testimony. At the trial, out of the hearing of the jury, Curley invoked his privilege against self-incrimination, and the judge allowed a motion to introduce his recorded testimony at the civil trial. It is now claimed that the admission of this evidence violated

the defendant's constitutional right to confront the witness against him.

Although the defendant does not argue the point, we note that prior recorded testimony is admitted when the witness is unavailable. We have applied this rule to witnesses who were dead, missing, or physically unable to testify Commonwealth v. Clark, 363 Mass. 467, 470 (1973), and cases cited. We now apply it to a case where the witness makes a plausible claim of his privilege against self incrimination, and is excused from testifying by the judge. United States v. Elmore, 423 F.2d. 775, 778 (4th Cir.), cert. denied, 400 U.S. 825 (1970). United States v. Mobley, 421 F.2d 345, 350-351 (5th Cir. 1970). See McCormick, Evidence §253 (2d ed.)(1972); 4 J. Weinstein & M. Berger, Evidence par. 804(a)[01] (1976); Annot., 45 A.L.R. 2d 1354 (1956).

The defendant contends that evidence given at a prior civil trial is not admissible at a subsequent criminal trial, since the parties and issues are not the same. We disagree. There is no requirement of "privity," "reciprocity," or "mutuality"; it is only the party against whom the prior testimony is now offered whose presence in the prior suit is significant. See McCormick, Evidence §256 (2d. ed. 1972); 5 J. Wigmore, Evidence §1388 (Chadbourn rev. 1974). The significant feature is whether that party had an adequate opportunity for cross-examination at the prior trial. Cf. Travelers Fire Ins. Co. v. Wright, 322 P.2d 417, 421 (Okla. 1958). (testimony in prior criminal case admitted in civil section) See McCormick, supra, §257; Fed. R. Evid. 804(b)(1)(1975).

Actual cross-examination at the prior trial is not required, but the party against whom the testimony is now offered must have had an adequate opportunity to exercise the right to cross-examine if desired. See 4 J. Weinstein & M. Berger, supra, par 804 (b)(1)[02]. The defendant in the present case called Curley as a witness in the prior civil case, and was entitled to cross-examine him as an adverse party. G. L. c. 233, §22. The substantial question is whether the defendant then had an adequate motive for the testing on cross-examination of the credibility of Curley's testimony. See 4 J. Weinstein & M. Berger, supra, par 804(b)(1)[04]; McCormick, supra, §257. The defendant was the plaintiff in the civil case, and Curley as one of the defendants in the civil case was defending on the ground that the agreement of the parties was illegal by reason of violation of G. L. c. 268A. That issue was substantially the same as the issue tried in the present case. It is not fatal that, as a tactical matter, the examination of Curley at the civil trial was primarily directed to the formation and terms of the agreement rather than to its illegality. Cf. Poe v. Turner, 490 F.2d 329, 331 (10th Cir. 1974) (cross-examination waived "on a matter that was not a real issue"). The formation and terms of the agreement were very damaging to the defendant on the issue of illegality in both trials.

The defendant argues that his constitutional right to confront the witnesses against him imposes more rigerous limitations than the general law

of evidence. He relies particularly on Mancusi v. Stubbs, 408 U.S. 204, 216 (1972), where the Court said that the prior testimony there in issue bore sufficient "indicia of reliability" and afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." In that case the defendant's first conviction had been set aside by reason of denial of the effective assistance of counsel, and at his second trial an important witness had become unavailable. Recorded testimony given by that witness at the first trial was admitted in evidence, and the defendant contended that the cross-examination at the first trial had been inadequate. The Court held that constitutional requirements were satisfied, since "there was an adequate opportunity to cross-examine" at the first trial, and counsel "availed himself of that opportunity."

We do not think the Court intended to lay down an absolute requirement of actual cross-examination as well as adequate opportunity for cross-examination for cases like the present in which there was no problem of ineffective assistance of counsel. In the present case "indicia of reliability" are furnished by the fact that the defendant, as plaintiff in the civil case, had called Curley as a witness to provide part of the basis for his claim, and by the fact that the defendant's own testimony at both trials corroborated much of Curley's testimony.

4. Reasonable doubt. In his charge on reasonable doubt, the judge instructed the jury that they must be convinced of the defendant's

guilt with "the kind of certainty you have when you are involved in those matters of the highest importance to you in your own life." We have several times criticized such instructions as confusing degree of certainty with degree of importance. As in many other such cases, we think the charge in this case, taken as a whole, adequately conveyed the concept of proof beyond a reasonable doubt. See, e.g. Commonwealth v. Fielding, Mass. Adv. Sh. (1976) 2290, 2315-2316. Contrast Commonwealth v. Ferreria, Mass. Adv. Sh (1977) 1594, 1602-1611.

Judgment affirmed.

LIACOS, J. (dissenting, with whom Abrams, J., joins). The defendant in this case is entitled to a new trial on the grounds that (1) the charge to the jury who convicted the defendant did not reflect the construction of G.L. c. 268A, §17(a), given by the majority opinion; (2) he was convicted under a theory of law which misconstrued the nature of G.L. c. 268A, §17(a);[1] and (3) the admission of the prior recorded testimony as part of the Commonwealth's case-in-chief denied the defendant his constitutional right to confront his accuser.

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[1]The defendant adequately excepted to the charge on this issue by incorporating his arguments relative to his motion for a directed verdict on the issue of the propriety of the charge. See Commonwealth v. Freeman, 352 Mass. 556 (1967).

This is the first case to reach this court calling for a construction of G.L. c. 268A, §17(a). The task of interpreting the statute, in harmony with the other provisions of G.L. c. 268A, is one of not inconsiderable difficulty, as is evident from the apparent confusion of both parties and the trial judge as to the nature and scope of the offense defined in §17(a).

The view of the statute taken by the majority of this court is a veiw with which I am in accord. The fact is, however, that this record reveals it as a view not followed at the trial by either the prosecutor or an able trial judge -- nor is it a view in accord with that of the Appeals Court. Cf. Commonwealth v. Dutney Mass. App. Ct. Adv. Sh. (1976) 682. Some further elaboration of the meaning of §17 (a) seems appropriate in this circumstance.

1. Chapter 268A of the General Laws is a comprehensive measure aimed at thwarting the improper use of influence on State and local public officials. Section 17(a), on which the defendant's conviction is grounded, it specifically directed at regulating the conduct of municipal employees which is inconsistent with the responsibilities inherent in the proper performance of a government job. Conflict of interest laws such as §17(a) occupy an area between bribery or the offer and acceptance of gratuities and innocent or trivial association with persons seeking the favor of municipal authorities for personal or business reasons. See Staff Report to Subcommittee

No. 5, "The Conflict of Interest Laws," House Committee on the Judiciary, 85th Cong., 2d Sess. (March 1, 1958).

The conduct proscribed by §17(a) is the request or receipt, by a municipal employee, of compensation from a nonmunicipal source whose private interests relate to a particular matter in which the municipality has a direct and substantial interest. Compensation, as defined by §1 of c. 268A, includes "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another."

Section 17(a) tracks the provisions of 18 U.S.C. §203 (1970). See Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 299 (1965); R. Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law, Essays for Austin Wakeman Scott 8 (1964); see generally B. Manning, Federal Conflict of Interest Law (1964). As such, it is clear that the intent of the Legislature in enacting §17(a) was to incorporate, as the crucial elements of this offense, those elements which are the basis of the correlative Federal offense. These elements are (1) the receipt of compensation as defined in §1, (2) contingent on the receipt or promise of services rendered. In the absence of either element, the apparent impropriety of the official's conduct does not make out the offense under §17(a). See Manning, supra at 36. Conversely, it is immaterial that the services rendered or to be rendered in exchange for the compensation may

be viewed as otherwise proper in nature. Id. at 36, 43. See May v. United States, 175 F.2d 994, 1006 (D.C. Cir. 1949). This section of the statute reflects the old maxim that "a man cannot serve two masters." It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence -- by action or inaction-- official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest.

It seems equally clear that not every act by a municipal employee may serve as the basis of an indictment which fails to discriminate between the various activities proscribed by the statutory scheme. What once were the activities involved in the so called bribery offenses under G.L. c. 268, §8, are now covered by G.L. c. 268A, particularly §§2(b) and 3(b). See Commonwealth v. Stasiun, 349 Mass. 38 (1965). Other penal offenses are defined by the statute in various sections. Additionally, a number of proscribed acts are covered by G.L. C. 268A, §23, in nonpenal terms. Such latter acts may be grounds for administrative action against the offending employee whether covered by the criminal provisions of the statate or not.

In the case currently before the court for decision, the defendant concedes that he was the city engineer of Marlborough during the planning

stages of the real estate investment scheme and at the time he received an initial payment of $5,000 following the sale of what was called the Davenport parcel to the developer. However, the defendant argues, in effect, that the $5,000 he received did not constitute compensation from a private source within the meaning of the statute. The defendant does not deny that the $5,000 payment he accepted was a direct consequence of the sale of the Davenport property to the developer, but he contends that the Commonwealth failed to demonstrate that he had rendered any services in exchange for the economic benefit he realized on the real estate venture. He argues that he was an investor like any other and that, absent evidence of services (or the promise of them) which were exchanged for compensation from a private source, the Commonwealth makes out no case under §17(a). The Commonwealth's response appears to be that a prima facie case is made by evidence (here present) that the defendant promised not to interfere with official municipal approval of the project if he was allowed to become an investor in the project. Assuming the Commonwealth's argument to be valid, it is an argument more properly addressed to the offense alleged under G. L. c. 268A, §2(b)(3),[2] or §3(b),[3] a charge which went to the jury and of which the

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[2]General Laws c. 268A, §2(b)(3) reads as follows: "(b) Whoever, being a state, county or municipal employee or a member of the judiciary

defendant was acquitted. I cannot ascribe to the Legislature an intent to be redundant. It seems clear that, if the defendant were receiving a benefit in order to affect his official conduct or to refrain from interfering with the progress of an application for a special permit as was here involved, that might well be an offense under G. L. c. 268A, §§2(b) and 3(b)[4]. Section 17(a), on

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or person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for ... (3) being induced to do or omit to do any acts in violation of his official duty."

[3]General Laws c. 268A, §3(b), reads as follows: "(b) Whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him."

[4]Cf. Commonwealth v. Dutney, Mass. App. Ct. Ct. (1976) (Mass. App. Ct. Adv. Sh. [1976] 682.) To the extent that Dutney indicates that the offenses proscribed by G. L. c. 268A, §§2(b) and 3(b), are identical with that defined by §17(a), it should not be followed. I do not reach the point

the other hand, reaches an area of activity not proscribed by either of those sections. In short, I construe this section so as to make criminal what had not been so prior to the enactment of G.L. c. 268A, namely, to receive compensation from private sources for services rendered, or to be rendered, to such private sources in any particular matter in which the municipality has a direct and substantial interest.

It is incumbent on the Commonwealth under this view of §17(a) to show that the employee rendered or promised services in exchange for money and in relation to a particular matter in which the municipality has a direct and substantial interest. The particular matter in this case is the issuance of the special permit.

The Commonwealth argues that the defendant's general "study" of the sewer problems for the site constitutes a rendering of services. I would agree that as a general matter such action in exchange for money would constitute a violation of §17(a), and there was sufficient evidence of such services in exchange for compensation (i.e. defendant's investment interest) to deny the motion for a directed verdict. Where the difficulty arises is that neither the judge's view of the case as expressed in his denial of the motion for a directed verdict, his charge, nor

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whether Dutney correctly holds that §3(b) is a lesser included offense under &2(b).

the Commonwealth's response to the defendant's motion for a bill of particulars or its presentation of the case defined this aspect as the Commonwealth's basis of alleged criminal conduct at the trial. To say that the defendant's conviction should stand because, in any event, a jury judging the facts of a case tried on a correct theory of law could have reached a verdict of guilty is improperly to invade the province of the jury to weigh the relevant evidence in accord with the applicable legal principles.

The law of this case, as tried and submitted to the jury, was not in accord with the majority's view of the nature of the crime under the statute. See Commonwealth v. Graves, 363 Mass. 863, 868 (1973). The judge's understanding of §17(a) seemed to rest on the proposition that only the receipt of money need be shown to justify the conviction. Nowhere were "services" as discussed here or in the majority opinion defined; nor need they have been under the judge's view of the case. It follows that the construction given the statute by the majority and myself cannot be used retroactively to validate a conviction based on an entirely different theory of what constituted the offense. I believe the conviction should be reversed so that the defendant can have the opportunity to defend this case on a theory consistent with the statutory prohibition.

2. During the Commonwealth's case-in-chief, testimony given at a prior civil trial by a co-indictee, one Curley, was read in evidence

following Curley's refusal to testify on Fifth Amendment grounds. The defendant contends that the admission of Curley's former testimony violated his Sixth Amendment right "to be confronted with the witnesses against him."[5] I would hold that the introduction in this case of testimony given in a prior civil proceeding by an individual who was thereafter indicted with the defendant abridged the defendant's constitutional right to be confronted with adverse witnesses.

Where the unavailability of a witness has been diligently established, we have sanctioned the introduction of testimony given at the defendant's initial criminal trial involving similar charges at which the defendant had an opportunity to cross-examine the witness. Commonwealth v. Clark, 363 Mass. 467, 470 (1973). Commonwealth v. Gallo, 275 Mass. 320, 328-334 (1931). Commonwealth v. Glassman, 253 Mass. 65, 73-74 (1925). Commonwealth v. Richards, 18 Pick. 434, 437-440 (1837). Accord, Mancusi v. Stubbs, 408 U.S. 204 (1972); Mattox v. United States, 156 U.S. 237 (1895).

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[5]Article 12 of the Declaration of Rights of the Massachusetts Constitution sets forth a similar right to meet adverse witnesses "face to face." The confrontation clause of the Sixth Amendment to the United States Constitution was applied to State proceedings through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400 (1965).

Similarly, we have authorized the introduction at a criminal trial of testimony given at preliminary hearings in the same criminal proceedings when the defendant had the opportunity during the preliminary hearing to cross-examine the witness and where the testimony of that witness was demonstrated to be unavailable at the defendant's trial. Commonwealth v. Caine, 366 Mass. 366, 371-372 (1974). Commonwealth v. Mustone, 353 Mass. 490, 492-493 (1968). Commonwealth v. Caruso, 251 Mass. 362, 366-367 (1925). Cf. Andrews, petitioner, 368 Mass. Adv. Sh. (1975) 2550, 2560. Accord, United States v. Bell, 500 F. 2d 1287, 1290 (2d Cir. 1974); Havey v. Kropp, 458 F.2d 1054, 1057 (6th Cir. 1972). Cf. California v. Green, 399 U.S. 149 (1970) (testimony given by a witness at a preliminary hearing, at which the defendant had an opportunity to cross-examine the witness, was properly introduced at the defendant's subsequent trial when the witness was available and subject to full cross-examination); United States v. Ricketson, 498 F.2d 367, 374 (7th Cir. 1974); United States v. Singleton, 460 F.2d 1148, 1152-1153 (2d Cir. 1972) (admitting a deposition at the defendant's trial did not violate the Sixth Amendment where the defendant had an opportunity to cross-examine the deponent when the deposition was taken and where the deponent was unavailable at trial).

The question presently before us is markedly different from that decided in the preceding cases. Nor is the question here the same as that before

the court in the recently decided case of Commonwealth v. DiPietro, Mass. Adv. Sh. (1977) 1971. The issue here is whether a defendant's constitutional right of confrontation is breached by the introduction of former testimony given during a civil trial by a witness whose live testimony becomes "unavailable" at the defendant's subsequent criminal trial. This case exhibits a perceptible discord between the interests protected by the right of confrontation and the rationale which supports the well recognized exception to the hearsay rule permitting, under special conditions, the admission of testimony given during a prior judicial proceeding.

Both the courts[6] and legal commentators[7] have recognized that the confrontation right and the hearsay rule safeguard similar values. However, the courts have been careful to note that the parameters of the confrontation clause and the hearsay rule are not congruent. Therefore, even though some hearsay statements are constitutionally admissible, exceptions to the hearsay rule do not uniformly contour the confrontation clause. Dutton v. Evans, 400 U.S. 74, 86

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[6] California v. Green, 399 U.S. 149, 155 (1970). Dutton v. Evans, 400 U.S. 74, 86 (1970).

[7] 5 J. Wigmore, Evidence, §1395 (Chadbourn rev. 1974) (hereinafter cited as Wigmore). See McCormick, Evidence § 252 (2d ed. 1972) (hereinafter cited as McCormick).

(1970)[8]. California v. Green, supra at 155.

"The right to confrontation is basically a trial right." Barber v. Page, 390 U.S. 719, 725 (1968). It is designed to make prosecution witnesses available for full cross-examination by the defendant and to ensure that the testimony of a witness is given under oath before the jury who will have an opportunity to observe the demeanor of the witness as he testifies. The right entitles the defendant to confront adverse witnesses personally. "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237 242-243 (1895).

When a prosecution witness becomes unavailable after testifying at a pre-trial hearing or at

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[8] Dean Wigmore argues, however, that confrontation is an element of the hearsay rule and hence is merely another name for the opportunity of cross-examination. 5 Wigmore §§1366, 1397.

the defendant's first trial, and a second trial becomes necessary, the Supreme Court has concluded that the substance of the confrontation right was afforded the defendant by the advantage he "once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." Mattox v. United States, supra at 244. Accord, Commonwealth v. Gallo, 275 Mass. at 328-334.

At the outset of the defendant's trial on the conflict of interest indictments, the Commonwealth presented a motion to the trial judge seeking an order compelling co-indictee Curley to testify on the theory that he had waived his right to assert the privilege against self-incrimination to the extent that he testified before the grand jury and at the prior civil trial on matters related to the criminal charges. Alternatively, the Commonwealth sought permission to introduce Curley's stenographically recorded testimony given during the earlier civil trial. The judge denied the Commonwealth's motion to compel Curley to testify but thereafter allowed the Commonwealth to introduce portions of the testimony given by Curley at the civil trial. The judge never articulated his reasons for permitting Curley's Fifth Amendment claim to stand. The majority opinion finds that a "plausible" claim of the privilege is sufficient. If "plausible" means "valid", I agree. It seems to me, however, that a decision resulting in a loss of a constitutionally protected interest should be more specific as to the particular circumstances which warrant the kind of procedure here used.

The unavailability of a witness during a criminal trial is a condition precedent to the introduction of former testimony in conformance with the confrontation clause and the exception to the hearsay rule. Plainly the unavailability of a witness is established when the individual's physical presence is impossible to procure. However, the salient consideration is not whether the individual's physical presence is obtainable, but whether the testimony of that person is available. Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), cert. denied, 400 U.S. 993 (1971). Accord, Poe v. Turner, 490 F.2d 329, 332 (10th Cir. 1974); United States v. Allen, 409 F.2d 611, 613 (10th Cir. 1969); 4 J. Weinstein & M. Berger, Evidence par. 804 (a)[01] (1976) (Weinstein & Berger); McCormick §253.

I agree that, when a prospective witness validly declines to testify based on a proper assertion of the Fifth Amendment guaranty against self-incrimination or steadfastly refuses to testify despite a court order to do so, the testimony of that witness is rendered unavailable. United States v. Elmore, 423 F.2d 775, 778 (4th Cir.), cert. denidd, 400 U.S. 825 (1970). United States v. Allen, supra at 613. Mason v. United States, supra at 906. Fed. R. Evid. 804(a)(1). See Cal. Evid. Code §240 (a)(1) (West); Weinstein & Berger, par. 804(a)[01]; McCormick §253; Annot., 45 A.L.R. 2d 1354 (1956).

The right to confront a witness before the jury who hear the case should not be lost in the

absence of a clear showing of need. Liacos, The Right of Confrontation, 33 Am. Trial Law. J. 243 (1970). Liacos, The Right of Confrontation and the Hearsay Rule: Another Look, 34 Am. Trial Law. J. 153 (1972). I note in this regard that the record fails to reveal any findings by the judge on the issue of whether or not a witness's prior testimony constitutes a waiver of the privilege. In these circumstances, the record fails to demonstrate satisfaction of even the threshold justification of a use of the Curley transcript in lieu of his live testimony.

Additionally, the unavailability of Curley's live testimony at the defendant's trial on the conflict of interest indictments is only an initial factor in a determination whether the former testimony was properly placed before the jury. Because the use of Curley's former testimony prevented the defendant from physically confronting Curley during the criminal proceedings, the circumstances in which the former testimony was given must be examined to ascertain whether the testimony was given in compliance with the requisites of the confrontation clause. Of primary concern is whether Curley's testimony in the civil trial bore sufficient "indicia of reliability," Mancusi v. Stubbs, 408 U.S. at 213; Dutton v. Evans, 400 U.S. at 89, to afford a satisfactory basis for the jury in the defendant's subsequent criminal trial to evaluate the trustworthiness of the prior testimony.

Opportunity and motive for cross-examination are the most crucial factors in any evaluation

of the reliability of former testimony. The prior judicial proceeding must furnish the defendant with an opportunity to confront the witness directly and to cross-examine him while he is under oath. More importantly, the considerations which guide the conduct of the cross-examination or the decision to waive cross-examination during the prior trial must be functionally equivalent to the considerations which prevail at the later trial where the former testimony is introduced. The defendant must have been a party to the earlier action. The confrontation clause permits nothing less. The issue on which the testimony was introduced in the first proceeding as well as the purpose for which the testimony was offered must be substantially similar to the issue and purpose for which the same testimony is offered at the subsequent criminal trial. Se McCormick §257. The issue and the purpose for offering the testimony need not be identical in both proceedings, but they must be sufficiently similar to ensure that the defendant had the same motive for cross-examining the witness at the earlier proceeding as he would have had at the later criminal trial, if the witness had appeared to testify. See Poe v. Turner, supra; Peterson v. United States, 344 F.2d 419, 424 (5th Cir. 1965); United States v. Franklin, 235 F.Supp. 338, 341 (D.D.C. 1964); Fed. R. Evid. 804(b)(1); McCormick §257, 5 Wigmore §1387; Weinstein & Berger, par. 804(b)(1)[04]. Cf. United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975); First Nat'l Bank v. National Airlines, Inc., 22 F.R.D. 46, 48 (S.D.N.Y. 1958).

The defendant in the present case was a party plaintiff in the prior civil proceeding. That trial was the result of an action initiated against Curley and Lynch by him to recover his share of the profits realized by the real estate investment venture. Among the defenses relied on by Curley and Lynch was the assertion that the agreement to include the defendant in the real estate venture was illegal because it violated G. L. c. 268A. Curley was called by the defendant to testify about the real estate venture and the oral agreement which made the defendant a co-investor in the project. Having called the opposing party while putting in his own case, the defendant was entitled to cross-examine him. G. L. c. 233, §22. However, the issue on which Curley's testimony was introduced was whether an agreement to include the defendant in the real estate venture had been reached by the parties. The defendant's motive for examining Curley was to demonstrate that an agreement had been concluded which made the defendant a participant in the project and entitled him to receive an equal share of the profit realized by the venture. Conversely, the testimony given by Curley in the civil trial was introduced by the Commonwealth at the defendant's criminal trial to prove that the defendant had illegally used his public office to foster private gain. Had Curley testified in person at the defendant's trial on the indictments, the defendant's motive for cross-examining him would certainly have been altered. He would have undoubtedly probed for inaccuracies and inconsistencies in Curley's testimony and he would have had a stronger motive to impeach the witness.

Equally important in considering whether the defendant's motive for cross-examining the witness was the same in both proceedings is the obvious shift in the underlying liability associated with the cases. In the civil action the defendant sought a financial recovery on the basis of an alleged breach of contract, but inthe criminal prosecution, not only his liberty, but his personal and professional reputation in the community, was at stake. The crucial question whether private services were promised or rendered to the private project by the defendant was not in issue at the civil trial. Although one of the defenses asserted in response to the defendant's contract claim was the alleged illegality of the agreement the foundational theory and liability of the two cases were not parrallel.

In the circumstances of this case, Curley's testimony at the civil trial failed to contain sufficient indicia of reliability to justify its placement before the jury in the defendant's trial on the conflict of interest indictments. The defendant is therefore entitled to a new trial at which his right to confront Curley will not be abridged by the introduction of testimony given by that witness in the earlier civil proceeding.

ABRAMS, J. (dissenting). I respectfully dissent from the failure of the majority to grant a new trial in this case. The well established law in this Commonwealth is that the judge has a duty "to declare what the law is, with its exceptions and qualifications, to explain it, and to state the reasons and grounds of it," in such a way that the

law will be "clearly intelligible to the minds of men of good judgment and common experience, but without legal knowledge and skill." Commonwealth v. Porter, 10 Met. 263, 283 (1846) (Shaw, C.J.)

Although the trial judge read the statute to the jury, in his conscientious attempt to distinguish § 17(a) from §2(b) and §3(b), he appears to have adopted the position that only the receipt of money need be shown to justify a conviction under §17(a). Such a view is not in accord with the interpretation this court today places on §17(a).[1] Nevertheless, the majority find that the jury instructions were adequate and that the jury were warranted in returning a guilty verdict. While I agree with the court's construction of §17(a), and while, in my view, ample evidence exists on which a jury could convict Canon, I disagree with the

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[1]Although the defendant did not take a specific exception to the instructions, after the charge he did except to the denial of his request for instructions. The judge's construction of the statute was in issue throughout the trial, and the defendant's exception thereto is, in my view, sufficient to preserve the issue of the adequacy of the instructions for review on appeal. See Commonwealth v. Crosscup, 369 Mass. , (1975) (Mass. Adv. Sh. [1975] 3482, 3499); M. Dematteo Constr. Co. v. Commonwealth, 338 Mass. 568, 587-589 (1959).

majority's disposition of this case. The majority assume without discussion that a jury would agree with them and would convict the defendant under today's interpretation of §17(a). Even assuming this to be the fact, I think that basic fairness and a proper regard for the jury system require that we grant the defendant a new trial.

In the past we have held it fundamental that jurors be guided by clear and correct instructions on the applicable legal principles. Commonwealth v. Corcione, 364 Mass. 611, 618 (1974). Commonwealth v. Kelley, 359 Mass. 77, 92 (1971). Commonwealth v. Rollins, 354, Mass. 630, 638 (1968). Commonwealth v. Carson, 349 Mass. 430, 435 (1965). Commonwealth v. Porter, supra at 283. See Commonwealth v. Benders, 361 Mass. 704 (1972). Instructions which are prejudicially erroneous or misleading on a crucial point of law have always required a new trial. Commonwealth v. Corcione, supra at 616-618. Commonwealth v. Benders, supra at 707-708. United States v. Brewster, 506 F.2d 62, 82-83 (D.C. Cir. 1974). Cf. Commonweal th v. Albert, 310 Mass. 811, 812 (1942). See Commonwealth v. Freeman, 352 Mass. 556 (1967) This result follows irrespective of the fact that ample evidence might exist to support the verdict on a correct theory of law. Jurors, not judges, decide the issue of guilt or innocence. See Commonwealth v. Corcione, supra at 617; Commonwealth v. Benders, supra at 707-708. Cf. Commonwealth v. Albert, supra at 820-821; Adamaitis v. Metropolitan Life Ins. Co., 295 Mass. 215, 221 (1936).

There is no reason to depart from basic principles in this case. Indeed, fairness mandates otherwise. Canon should not be the only exception to a general rule. The trial, the arguments, and the instructions all suggested to the jury that only the receipt of money need be shown to justify a conviction under §17(a). The jurors were not given any specific guidance on the essential element of "services rendered or to be rendered."

Moreover, under our legal system, the responsibility for stating and explaining the law is allocated to the judge, and the duty of deciding questions of fact and of applying the law to the facts is given to the jury. Commonwealth v. Abbott, 13 Met. 120, 124 (1847). Sparf & Hansen v. United States, 156 U.S. 51, 102, 106 (1895). Commonwealth v. Dickerson Mass. Adv. Sh. (1977) 1344, 1362, 1364-1366. (Quirico, J., concurring). This division of functions between the judge and the jury has long been recognized as an essential element in providing justice: "In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights." Sparf & Hansen v. United States, supra at 106. See Commonwealth v. Bellino, 320 Mass. 635, 639, cert. denied, 330 U.S. 832 (1947). The failure to grant Canon a new trial blurs the distinction between these functions.

Finally, the jury system provides the most important means by which laymen can participate in and understand the legal system. "It makes them feel that they owe duties to society, and that they have a share in its government .... The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense" (emphasis supplied). 1 W. Holdsworth, A History of English Law 348-349 (3d ed. 1922).

I dissent from the majority's disposition of this case since it appears to me to be but the first step in diminishing the extent of citizen participation in the administration of justice and the many benefits which flow from such participation.

For these reasons, where, as here, there is a material disparity between our interpretation of a statute and that given the statute at trial, a new trial is mandated. "[W]e have no authority to take upon ourselves the duties of a tribunal of fact, and to determine what verdicts should have been rendered by the jury .... Convenient and helpful as it might be to the litigants to have these cases finally decided without further litigation, we must decline to act extrajudicially in a matter that comes before us sitting as a court." Electric Welding Co. v. Prince, 200 Mass. 386, 392 (1909).

October 25, 1977

Honorable Edward F. Hennessy
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Commonwealth v. Canon

My Dear Chief Justice Hennessy:

In accordance with the provisions of Rule 27 of the Massachusetts Rules of Appellate Procedure, I submit herewith defendant-appellant's Petition For Rehearing in the subject cause.

Considering that the Court deemed it desirable to invoke the seldom utilized provisions of Appellate Rule 23(a), that the Court's opinion provoked two strong dissents, and the lengthy period the case was under consideration before the rendition of the decision, it might appear presumptuous (or even silly) for undersigned counsel to think that there could be anything to be said now that the Court has not thoroughly considered. The Court's decision itself, however, injects new matter into the case because of its completely unexpected and unique interpretation of G.L. c. 268A, §17, which has never been before addressed by counsel. The defendant herewith presents two reasons which

require at least briefing by the parties and reconsideration by the Court: 1. the Court's own interpretation of §17 demonstrates that the defendant committed no crime, and 2. that interpretation raises constitutional questions not addressed by the Court.

The Court holds that sufficient evidence was adduced of a §17 crime in that the "compensation" Canon received was "an opportunity to participate in the realty investment" "in return for his promise of general engineering advice 'to be rendered' by him", and that the "particular matter" in which his municipal employer had "a direct and substantial interest" was "the granting of the permit" to build an apartment complex on the property. Even if there were sufficient evidence to prove the elements derived by the Court (and as to Canon's proffered "promise", there was not [see below]), the fundamental error in such a holding is that it overlooks the very language of §17 itself. That statute in its relevant part provides: "No municipal employee shall ... receive or request compensation ... in relation to any particular matter in which the same city ... has a direct and substantial interest." The statute does not forbid <u>any</u> "compensation" from <u>any</u> non-municipal source, only when such "compensation" is "<u>in relation to</u>" something in which the city has a "direct and substantial interest." Canon could have with impunity sold life insurance to the Mayor, for instance. Here the city did not have the required direct interest in Canon's opportunity to invest, conferred back in January, and that "compensation" had no relationship to the

permit granted in April, and unless there is such a direct relationship between the "compensation" and the "interest" there is no crime. If Canon's "general engineering advice" (the consideration for the "compensation") had anything to do with the permit, such a relationship might be argued to exist, but it is uncontroverted from the evidence that engineering considerations did not enter into the permit grant (The City Council considered only the tax impact, the need for any developer to share the cost of providing services, etc.), and also that Canon had absolutely no connection, even indirect, with the grant of the permit.

An investment opportunity assumes a profit, here a sale to a developer, but that sale occurred in July, months after the city had specified its only "interest" by conditioning any buyer's development upon his paying part of the cost of supplying services. The Court's opinion finds Canon's "compensation" in his "opportunity" even "if the investment produced no profit", but even if the "compensation" is therefore frozen in time, as of its grant in January, and the subsequent sale and return on the investment therefore immaterial, the Court's view would still require the directed verdict. The investment opportunity clearly vested in January, 1968, three months outside the six year statute of limitations (the indictment was returned in April, 1974). Both the quid (Canon's "promise") and the quo (his "opportunity" to invest) were given in January, 1968. The Court rules the statute of limitations satisfied because Canon received part of his profit money in July, but that

is not the "compensation" relied on by the Court to satisfy §17. His investment "opportunity", his "compensation", is barred by the statute of limitations, and his July profit payment as a result of the sale is just as obviously not a "particular matter" in which the city had a "direct and substantial interst." Either view does not make out an indictable crime. The July payment is useless for another reason: it is not even "compensation" under §1 as it was not for "services rendered or to be rendered." Canon clearly had rendered no services (which is why the Court had to construct his "promise" to find any criminality), and there were no services to render after the July sale.

No jury was warranted to find on this evidence the required relationship between the elements of the crime as the Court itself interprets them, and without that relationship the fundamental criminal nexus is absent. This is no exercise in semantics. The defendant has accepted the Court's two newly defined criminal elements, "compensation" and "interest", and demonstrated that the relationship between them mandated by the statute quite apparently does not exist.

For the purpose of this argument the defendant has so far accepted the factual linch pin to the Court's theory of Canon's "consideration": his "promise of general engineering advice 'to be rendered' by him." The opinion alludes to that "promise" as if it were a "given" from the evidence, but in fact one answer by Canon during his civil

trial testimony (in context quite ambiguous) is the one and only jot of evidence supporting such a "promise". Overlooked is the truth that all the other evidence is overwhelmingly to the contrary--so much so, that the Commonwealth itself accepted as an established fact that Canon was to contribute only money to the venture, and so argued to the jury (Tr. 805-808). The evidence which the Court unearthed of its all-important "promise" is so slim it cannot be made the basis for the contention that the jury would have been warranted to find there was such a "promise"--even if that question had been presented to them, which, of course, it was not.

The second reason why there should be a rehearing herein, so that issues apparent for the first time may at least be briefed, is that the Court's opinion raises serious constitutional errors which have not been addressed by either counsel or the Court. Both dissenters take issue with the Court's holding that even though this jury was instructed only that the defendant's receipt of money itself made out the crime under §17, had they been asked to weigh the evidence under the Court's unique interpretation of the statute they would have been warranted to find him guilty. Neither dissent discusses this absolutely unprecedented holding in a constitutional context, but the defendant most strongly submits that such a new rule of law represents a most fundamental denial of due process of law, and abridges his rights under the Fourteenth Amendment. It abrogates entirely the defendant's right to trial by jury. The Court

does not discuss its holding or cite any authority that such a disposition is within an appellate court's power. The Court s opinion does not seem even to realize the essential constitutional wrong that it has perpetrated, even though fundamentally delineated in the dissents. The question should at least be briefed and reconsidered by the Court.

The Court's holding thrusts deeply into the heart "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). How can an appellate court promulgate a wholly new interpretation of a criminal statute--one not even arguably presented to or passed upon by the jury--and hold that if the jury had been so instructed it would have agreed with the appellate court's finding! Such a holding is completely unprecedented. This jury was not asked if there was evidence beyond a reasonable doubt of any "promise" by Canon, or any investment "opportunity" awarded within the definition of "compensation", or whether the city had "a direct and substantial interest" in the permit award, or (last, but by no means least) if any "compensation" was "in relation to" the permit. Fairly inferable from the not guilty verdicts on the three other indictments, is the fact that this jury in fact found no "promise" or the verdicts are inconsistent. This jury found only one thing under the instructions given on §17--and only this jury could convict: since Canon admitted he received the $5,000 profit, and that constitutes the crime, he is guilty. That interpretation of §17 was wrong, as the defendant argued throughout, and the Court now agrees, but the Court cannot constitutionally now

empanel itself as a super jury and say that under the correct interpretation of the statute, now, quite uniquely, devised, Canon is guilty. No appellate court can do that--it simply cannot under our constitution--but by its opinion this Court has.

The Court's interpretation of §17 also renders the statute as applied unconstitutionally "void for vagueness." What Massachusetts citizen "of ordinary intelligence" in 1968 would have had "fair notice that his contemplated conduct is forbidden by the statute", and the constitution "insist[s] that the law give fair notice of the offending conduct", as the United States Supreme Court put it in its unanimous (and lovely) opinion in Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)? All Massachusetts commentators and the Attorney General in two opinions, and all Federal authorities interpreting a correlative statute, held that some actual "services rendered", some participation in "the particular matter", was required of the municipal employee. In this case neither intelligent and experienced counsel nor the trial judge even imagined that a "promise" was enough, as this Court now, uniquely, interprets §17 to say. Even the Appeals Court last year thought otherwise. See, Commonwealth v. Dutney, Mass. App. Ct. Adv. Sh. (1976) 682, 689. Until now, proof of such an agreement (Canon's "promise") would have constituted conspiracy to commit a §17 crime--whatever §17 is--not a separate substantive crime itself. Why would the legislature have intended a redundancy, sub silentio, and contrary to all authority, when such a "promise" was already a

crime? Would not the citizen "of ordinary intelligence" have reasonably read §17's "services" "to be rendered" to cover situations where the employee's "request" for or receipt of "compensation" simply occurred prior to his actual rendition of the services--that criminality is not avoided by being paid first? The Court's §17 was at best "void for vagueness" until now. And what of scienter? The Court's opinion does not mention this element of the crime in conjunction with its theory, yet seems to recognize that intent is an element, as all the Federal cases hold. This jury was instructed that §17 was malum prohibitum--the receipt of money alone was enough. Even constituted as a super jury, the Court does not allude to what evidence warrants finding the necessary intent.

Counsel is keenly aware that the members of the Court would not be human if they did not have a rather automatic disinclination to rehear this case, particularly. It has already obviously sparked deep controversy on the Court. The very natural reaction of the majority will no doubt be: "We've finally disposed of this thing, and that was hard enough, and we're just not going to think about it again." The defendant pleads that those comfortable and quite natural reactions be rejected, and that at least two more Justices realize that this "hard case" may be making "bad law", and permit counsel to at least brief these issues and reconsider the opinion herein.

Respectfully yours,
Daniel F. Featherston, Jr.

DFF:mtr
CC: District Attorney John J. Droney

October 28, 1977

Daniel F. Featherston, Jr., Esq.
7 Water Street
Boston, MA 02109

Re: Commonwealth v. Anthony J. Canon
SJC 605
Mass. Adv. Sh. 2134 (1977)

Dear Mr. Featherston:

Your request for a rehearing in the above-entitled case has been considered by the court and is denied.

Very truly yours,

Frederick J. Quinlan

Clerk

FJQ: c

cc - Mr. John J. Droney
District Attorney
Middlesex Superior Court House
East Cambridge, MA 02141

APPENDIX B

Massachusetts General Laws, Chapter 268A, § 17 (a): "No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone . . . in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest . . . "

Massachusetts General Laws, Chapter 268A, §1 (Definitions):

" . . . (a) 'compensation', any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another . . . "

* * * *

" (k) 'particular matter', any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court . . . "

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1048.

ANTHONY J. CANON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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In the
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ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioner's citation of the opinion below or his statement of jurisdiction.

Questions Presented.

1. Whether the admission in evidence at petitioner's criminal trial of a transcript of an unavailable severed co-defendant's testimony at a prior civil trial violated the Confrontation Clause?

2. Whether the petitioner was denied his right to trial by jury by reason of the trial judge's instruction to the jury?

Statement of the Case.

Prior Proceedings.

On April 8, 1974, the defendant, Anthony Canon, was charged by the grand jury for Middlesex County with violations of Mass. Gen. Laws c. 268A, §§ 17(a) and 19, the conflict of interest statute. He was also charged with two counts of bribery for violations of Mass. Gen. Laws c. 268A, §§ 2(b)(1), (3) and 3(b). The defendant proceeded to trial on April 15, 1975; he was found guilty of receiving or requesting compensation for services performed or to be performed in violation of Mass. Gen. Laws c. 268A, § 17(a), but was acquitted of the other charges. He was thereafter sentenced to probation for a period of one year.

On appeal the conviction was affirmed by the Supreme Judicial Court. *Commonwealth* v. *Canon*, Mass. Adv. Sh. (1977) 2134.

Statement of the Facts.

The facts as they appear in the opinion of the Supreme Judicial Court may be summarized as follows:

Anthony J. Canon was the City Engineer of Marlborough, Massachusetts. On January 9, 1968, Canon and two other persons, Curley, a real estate broker, and Lynch, an attorney, entered into an agreement to contribute $500 each towards an investment in an option for a parcel of land within the city. The exercise of the option was contingent upon the receipt of a special zoning permit which would allow the building of apartments on the parcel of land. *Commonwealth* v. *Canon*, Mass. Adv. Sh. (1977) at 2135-2136.

Prior to the January 9, 1968, agreement, Canon had given engineering advice to the two men concerning the cost and feasibility of connecting the aforementioned parcel of land to the Marlborough sewer system. *Commonwealth* v. *Canon*, *supra*, at 2136. According to testimony from Curley and Lynch, it was at this time that Canon indicated that he intended to become part of the project and stated that his lack of participation would result in its failure to be connected to the sewer system. *Id.* On January 9, 1968, Canon met with Curley and Lynch, declared that "there's no way this is going any place without me aboard," and left his check for $500 on the table. It was agreed that the defendant would also contribute general engineering advice to the project. *Id.*

The special permit was obtained, and the land was bought for $40,000 and resold to a developer for $100,000. *Commonwealth* v. *Canon*, *supra*, at 2135. In the summer of 1968, the defendant received $5,500 as a return on his original investment of $500 and part of his share of the profit. *Id.* When no further payments were forthcoming, Canon sued Lynch and Curley for the remaining $15,000, which was his share of the profits. Lynch and Curley defended Canon's breach of contract suit on the ground that the agreement was void as against public policy, as it

violated Mass. Gen. Laws c. 268A. At the civil trial, the judge directed a verdict for Lynch and Curley and referred the case to the district attorney.

The three parties to the contract were charged with violating Mass. Gen. Laws c. 268A. Canon was convicted of violating Mass. Gen. Laws c. 268A, § 17(a), and acquitted of all other charges. He was thereafter sentenced to probation of one year. *Commonwealth* v. *Canon*, *supra*, at 2134-2135.

At Canon's trial, severed from the trials of Lynch and Curley, the Commonwealth called Curley, the real estate broker who had testified at the civil trial about the alleged illegality of the contract, as a witness. Curley was permitted by the trial judge to invoke his privilege against self-incrimination and refused to testify. The trial judge then allowed a motion by the Commonwealth to introduce Curley's recorded testimony given as an adverse witness to Canon at the civil trial. *Commonwealth* v. *Canon*, *supra*, at 2140.

Argument.

I. Admission of Prior Recorded Testimony, Subject to Cross-Examination, of a Witness who is Unavailable at a Subsequent Trial does Not Constitute a Constitutional Violation.

Testimony of a witness who is unavailable and has given testimony at a prior judicial proceeding against the same party and was subject to cross-examination by that party is admissible and not violative of the Confrontation Clause. *Mattox* v. *United States*, 156 U.S. 237 (1895); *United States*

v. *Wingate*, 520 F. 2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). The Federal Rules of Evidence permit the use of former testimony when the declarant is unavailable as a witness. Federal Rules of Evidence, Rule 804(b)(1) (1977). When prior testimony was subjected to a cross-examination with an equivalent motive and similar issues, the admission of that testimony at a subsequent trial was held not to have violated the Confrontation Clause. *Mattox* v. *United States*, *supra*; *California* v. *Green*, 399 U.S. 149 (1970); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972).

While the nature of the two proceedings is a factor to be considered when deciding whether to admit former testimony, a court must focus on a determination of whether there was an opportunity to cross-examine and whether there is a substantial identity of issues between the prior testimony and the purpose for which it is to be introduced at a later time proceeding. *Mattox* v. *United States*, *supra*; *California* v. *Green*, *supra*, at 165-166; *Mancusi* v. *Stubbs*, *supra*. *See also*: *Bruton* v. *United States*, 391 U.S. 123, 136 (1968); *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965).

A. *Opportunity To Cross-Examine.*

The defendant called Curley as a witness in his civil case, and, under Massachusetts law, he was entitled to cross-examine him as an adverse party. Mass. Gen. Laws c. 233, § 22. The defendant was represented by counsel and had the opportunity to cross-examine the witness. The proceedings were conducted before a judicial tribunal and recorded.

There is no evidence that testimony at a civil trial is less reliable than that at a criminal trial. Respondent respectfully submits the previous testimony at the civil trial bore sufficient "indicia of reliability" to allow the trial judge to

admit it into evidence at the defendant's criminal trial. *Dutton* v. *Evans*, *supra*, at 89.

B. *Substantial Identity of Issue.*

The requirement of substantial identity of issues is to insure that the motive and interest in developing the witness' testimony in the prior hearing is similar to that which would exist in the subsequent trial. See *United States* v. *Wingate*, *supra*, at 316; Federal Rules of Evidence, Advisory Committee's Note, § 804.01. Respondent respectfully submits that, in comparing the issues in the two proceedings, the court should focus upon the issues to which the witness' testimony was directed in each instance. *United States* v. *Wingate*, *supra*; *Travelers Fire Insurance Co.* v. *Wright*, 322 P. 2d 417 (Okla. 1958); 11 *Moore's Federal Practice*, § 804.04[3] (2d ed.).

The witness in the instant case appeared as a defendant in the civil suit brought by Canon upon the identical subject matter involved in the subsequent criminal trial. Canon, in the civil suit, attempted to prove that the contract was valid and not void as against public policy. In order to overcome the other parties' defense, Canon's attorney had to establish, by examinations of Lynch and Curley, that no criminal activity had occurred which violated Mass. Gen. Laws c. 268A. Thus, cross-examination of the adverse witness would be prompted by the same motive and purpose as in the subsequent criminal trial.

There is greater similarity between the civil and criminal trials in the instant case than is usual with a criminal matter. The conflict of interest statute, Mass. Gen. Laws c. 268A, § 17(a), under which the defendant was convicted, does not require a corrupt intent on the part of the violator, as does the bribery statute. *Commonwealth* v. *Canon*,

supra, at 2145 (Liacos, J., dissenting); R. Braucher, *Conflict of Interest in Massachusetts, in Perspectives of Law, Essays for Austin Wakeman Scott*, 8 (1964).

The lack of a requirement of criminal intent as an element in the conflict of interest violation made the defendant's conviction more akin to a civil offense than the usual criminal conviction. Therefore, where there is an opportunity for cross-examination of the witness by the party against whom the testimony was introduced and there was an accurate record of the testimony, and there was a substantial identity of issues, respondent respectfully submits that the admission of the former testimony did not violate the defendant's right to be confronted with witnesses against him.

II. The Construction of a State Statute is a Matter of State Judicial Interpretation and does Not Present a Federal Question Capable of Review by the Court.

It is fundamental that the state courts are the ultimate expositors of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).

The Supreme Judicial Court found that the trial judge had correctly instructed the jury with regard to Mass. Gen. Laws c. 268A, § 17(a) *Commonwealth* v. *Canon*, *supra*, at 2139.* There is no evidence that the trial judge's instruc-

*On his appeal to the Supreme Judicial Court the petitioner did not claim a denial of his right to jury trial. Therefore, the issue is not ripe for review. The issue presented to the state court involved the sufficiency of the evidence and does not present a federal question. *Grundler* v. *North Carolina*, 283 F. 2d 798, 805 (4th Cir. 1960); *Bell Tel. Co.* v. *Pennsylvania Pub. Utility Commrs.*, 309 U.S. 30 (1940).

tions were inconsistent with the Supreme Judicial Court's interpretation of the statute or with the jury's verdict.

In addition, the defendant took no exception to the judge's instructions to the jury. *Commonwealth* v. *Canon*, *supra*, at 2139. In a case involving the jury instructions given by a federal judge, this Court characterized appellate consideration of a trial court's instruction which was not obviously prejudicial and to which the defense did not object during the trial as "extravagant protection." *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

The Court has most recently stated:

> "In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation — beyond the reading of the statutory language itself — of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. Since this omission escaped notice on the record until Judge Cardamone filed his dissenting opinion at the intermediate appellate level, the probability that it substantially affected the jury deliberations seems remote.
>
> "Because respondent did not submit a draft instruction on the causation issue to the trial judge, and because the New York courts apparently had no previous occasion to construe this aspect of the murder statute, we cannot know with certainty precisely what instruction should have been given as a matter of New York law. We do know that the New York Court of Appeals found no reversible error in this case; and its discussion of the sufficiency of the evidence gives us guidance about the kind of causation instruction that

> would have been acceptable." *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977).

Respondent respectfully submits that a review by this Court of the jury instructions in the instant case, which construe a state statute, and involve no federal question, and to which the defense made no objection, would be not only extravagant, but improper. See *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

It is a fundamental principle that this Court will not review judgments of state courts about procedural or substantive matters unless federal constitutional rights are involved. *Ward* v. *Board of County Commrs.*, 253 U.S. 17 (1920); *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

That petitioner has not raised a constitutional issue is further demonstrated by his reliance on *Bollenbach* v. *United States*, 326 U.S. 607 (1946). *Bollenbach* involves merely the exercise of the federal court's supervisory powers.

Since the petitioner cannot establish that the instructions were erroneous, it is impossible for him to show that the resulting conviction was a violation of due process, the standard necessary for review by this Court. *Henderson* v. *Kibbe*, *supra*, at 154.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix.

FEDERAL RULES OF EVIDENCE.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. — "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of

the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. — In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. — (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or, was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if

the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Massachusetts General Laws, Chapter 233.

§ 22. [Cross-Examination of Adverse Party.]

A party who calls the adverse party as a witness shall be allowed to cross-examine him. In case the adverse party is a corporation, an officer or agent thereof, so called as a witness, shall be deemed such an adverse party for the purposes of this section.

Massachusetts General Laws, Chapter 268A.

§ 17. [Municipal Employee Not to Receive or Be Offered Outside Compensation in Relation to Certain Matters, or Act as Attorney in Such Matters; Exceptions.]

(*a*) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in

relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(*b*) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(*c*) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

A special municipal employee shall be subject to paragraphs (*a*) and (*c*) only in relation to a particular matter (*a*) in which he has at any time participated as a municipal employee, or (*b*) which is or within one year has been a subject of his official responsibility, or (*c*) which is pending in the municipal agency in which he is serving. Clause (*c*) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a municipal employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a municipal employee, including a special employee, from acting, with or without

compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1048

ANTHONY J. CANON,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITIONER'S REPLY BRIEF

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The Commonwealth's Memorandum In Opposition so blatantly misstates the facts in the course of attempting to obfuscate the issues that a response is mandated. The Commonwealth is no doubt aware of the Court's proper reluctance to determine constitutional issues on a record with controverted facts, but this case is not so disabled. Only the Commonwealth's fundamental misstatements of fact make it appear so.

Relative to the Confrontation Clause question, on the crucial point of the identity of issues in the civil and criminal trials, the Commonwealth says (p. 6) that "Canon, in the civil suit, attempted to prove that the contract was valid and not void as against public policy.... [that he] had to establish by examinations of Lynch and Curley, that no criminal activity had occurred which violated Mass. Gen. Laws c. 268A." That simply is not true. Canon neither "had" nor "attempted" to prove the absense of criminal activity at the civil trial. In their answer to Canon's contract complaint, Lynch and Curley alluded generally to c. 268A as one of their affirmative defenses, but, as noted in the Reasons For Granting The Writ, that chapter includes at least one section with non-criminal strictures, and also subtends the traditional crimes of bribery and extortion. Not only did Canon have no proof obligations on this general affirmative defense, the defendants themselves made little effort to establish it. A reading of the trial transcript does not include a single question, a comment of counsel, anything to indicate that the affirmative defense envisaged were the technical conflict of interest crimes, or specifically §17, and, of course, no one could know then that §17 would be so uniquely interpreted as the Supreme Judicial Court later came to do in this case. The defendants did not address the issue, Canon did not "attempt to prove" a negative--c. 268A was a "nonissue" at the civil trial. There was no "identity of issues" in the civil trial--by no stretch of even hindsight imagination--for the additional reasons specified in Mr. Justice Liacos's dissent

and in the Petition herein. It is unseemly for the Commonwealth to try and make it appear otherwise by the expedient of misstatement. Obfuscation is further fostered by the Commonwealth ignoring the unique legal reality presented here: the first and only reported decision ever to hold that prior civil testimony is admissible in a criminal trial. The state takes no issue with that stark fact; it simply does not address it.

The Commonwealth then tries to eliminate the second important question presented by characterizing it as a matter of a state interpreting it's law and the correctness of jury instructions, and in the course of that effort again egregiously misstates the facts. The actual question presented (also wholly ignored in the Commonwealth's memorandum) is a very different one: whether it is a denial of due process by a state appellate court itself to rule that if the jury had been properly instructed, it would have convicted the defendant. Petitioner does not question a state's basic right to interpret it's own laws. He does contend, as one of the dissenters here put it, that it is, however, unconstitutional for such an appellate court interpretation of a statute to "be used retroactively to validate a conviction based on an entirely different theory of what constituted the offense." Such a holding, as the second dissenter clearly perceived, "is improperly to invade the province of the jury". The trial court's instructions are relevant to this issue only to the extent that they presented to the jury "an entirely different theory of what constituted the offense" subsequently defined for the first time in

the appellate court's opinion. If the jury instructions mirrored the subsequent appellate court interpretation, then, of course, this entire issue would be nonexistent. The Commonwealth says (ps. 7-8) they did, that the instructions were the same as the appellate interpretation. That just is not so. The Commonwealth misstates the crucial fact. Both dissenters made that plain, and it was the principle reason for their dissents. Justice Liacos says (Pet'n. App. p. 34), "this record reveals ['the view of the statute taken by the majority of this court' was] not followed at the trial by either the prosecutor or an able trial judge", and Justice Abrams says (Pet'n. App. p. 51), that the jury instruction was "not in accord with the interpretation this court today places on §17(a)." They are clearly correct, and we are not dealing with subtle nuances: the trial judge charged that the receipt of any money from a private source by a municipal employee alone made out a crime under §17(a). The Supreme Judicial Court clearly held that more was required, some consideration by the employee, here, a promise to render engineering services. No jury ever passed on the crime as so defined. A reading of only the majority opinion would, admittedly, not disclose this basic fact (the majority even says, inexplicably, that the charge was "adequate" [Pet'n. App. p. 28]), but that is but another indicia of the "bad judging" here involved, an intellectually dishonest gossamer over what the majority had really done. The Commonwealth's Memorandum compounds the dishonesty.

More "sand in the air" is the Commonwealth's principle argument on this issue (ps. 8-9), that

"the defendant took no exception to the judge's instructions." Even if that were true, it is immaterial, since the error alleged is by the appellate court, but it is not true. Even this attempt to blur the issue is grounded on a mis-statement of fact. Counsel's very first exception (Trial transcript, p. 853) was to the trial judge's failure to give his "Requests [For Instructions] 1 through 10", which included his view of §17(a), which was contrary to the instruction given, and the transcript is replete with pages of specific argument in the lobby about the correct interpretation of the statute, and in the course of arguments on the motions for directed verdicts before and after the jury verdict. The majority opinion does, erroneously, say in passing (Pet'n. p. 28) that "the defendant took no exception to the charge", but both dissenters specifically correct that error also in what is footnote 1 in each dissent (Pet'n. ps. 33; 51). Fundamentally, however, this issue of the Supreme Court's own denial of due process remains, even if no exception were taken to the charge. The constitutional error is the appellate court's, not the trial court's.

The Commonwealth's final attempt to "muddy the waters" on this issue is it's argument (ft. nt. p. 7) that "the issue is not ripe for review" because petitioner "did not claim a denial of his right to jury trial" in the Supreme Judicial Court. Obviously, petitioner did not argue that issue initially in his brief, because until the opinion was handed down there was no such error. As the Petition here makes plain, the claimed denial of due process is by "the

Massachusetts Supreme Judicial Court itself." When the opinion displayed the error, however, petitioner duly filed a Petition For Rehearing (set out in full on pages 55-62 as part of the Appendix to this Petition), and one of the arguments therein summarized is this one: (ps. 59-61) that the court's ruling "abrogates entirely the defendant's right to trial by jury.... the Court cannot constitutionally now empanel itself as a super jury and say that under the correct interpretation of the statute, now, quite uniquely, devised, Canon is guilty. No appellate court can do that -- it simply cannot under our constitution -- but by its opinion this Court has" (Emphasis in original). The issue is "ripe for review". It was presented clearly as soon as it arose in the only guise then available. Again, the Commonwealth misstates the facts.

With the corrections, it is hoped that the Court can see that these two fundamental constitutional errors are presented on a stark and unarguable record. Only the Commonwealth's overzealous advocacy appears to make the facts ambiguous.

Respectfully presented,

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